UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

LOCAL 1075, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

and

MICHIGAN LABORERS' DISTRICT COUNCIL

and

Cases 7–CC–1831 7–CC–1832

McCARTHY & SMITH, INC.

Sarah Pring Karpinen, Esq., for the General Counsel.
Scott Graham, Esq., (Scott Graham, PLLC), of Portage,
Michigan, for the Respondents.
Scott Fisher (Associated General Contractors of
Michigan), of Lansing, Michigan, for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. The consolidated complaint, issued on June 30, 2009, 1 arose from unfair labor practice (ULP) charges that McCarthy & Smith, Inc. (MS) filed against Local 1075, Laborers' International Union of North America (the Local) and Michigan Laborers' District Council (the District Council), alleging violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Detroit, Michigan, on August 26, 2009, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I have duly considered the helpful posthearing briefs that the General Counsel and Respondents filed.

Issue

From June 4 –25, did Respondents jointly engage in unlawful secondary picketing at MS' Marysville High School, Marysville, Michigan jobsite (the jobsite), in furtherance of its labor dispute with Gemelli Concrete, LLC (Gemelli) and Brazen & Greer, Inc. (BG).

Witnesses

The General Counsel called Brian MacAskill, MS' project superintendent; Steve Banchero, MS' senior project manager; Rebecca Gemelli, part owner of Gemelli; and Don

¹ All dates hereinafter occurred in 2009 unless otherwise specified.

Bovre, director of labor relations of the American General Contractors of Michigan (AGC), out of its Lansing, Michigan office.

The General Counsel also called, as an adverse witness under Section 611(c) of the Act, William Bartlett of the Abatement Coordinator Trust Fund, an affiliate of the District Council. Respondents' counsel questioned him thereafter.

Most salient facts are undisputed, and differences in the testimony of the General Counsel's witnesses in chief and of Bartlett were in details rather than substance. To the extent that MacAskill differed from Bartlett in his descriptions of the picketing, I find the former more reliable. He testified credibly and in detail and did not appear to make efforts to exaggerate the facts. Bartlett, on the other hand, gave inconsistent testimony on the motivation behind the picketing and was somewhat evasive in answering whether the pickets continued to picket at the neutral gate after implementation of a dual-entrance system starting on June 9.

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Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, I find the following. Jurisdiction as alleged in the complaint has been admitted, and I so find.

The Parties and their Relationships

The AGC serves as a multiemployer bargaining representative in negotiating contracts
with the District Council and its local affiliates, including the Local.² By letter of March 6, Bovre notified the District Council of the AGC's intent to terminate the 2006–2009 agreement that expired on May 31.³

Employer-members of the AGC may also sign "independent agreements" with the District Council and its locals. Gemelli and BG signed such agreements, which also expired on about May 31.4

MS is a construction management company and member of the AGC, southeast branch. It has never been party to any AGC multiemployer contract with Respondents, and the AGC has never bargained on its behalf. It has had no employees performing labor work on the jobsite at any time relevant.

MS contracted with the Marysville, Michigan public school system to manage and coordinate all facets of construction of the new Marysville High School. The project started in approximately mid-July 2008 and is anticipated to continue into 2011. The current phase involves the work of approximately 45 contractors and subcontractors that have contracts directly with the school district.⁵ These include Gemelli and BG.

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² See GC Exh. 18, a list of companies that have signed powers of attorney authorizing AGC to negotiate on their behalves.

³ GC Exh. 19.

⁴ See Jt. Exh. 2.

⁵ See GC Exh. 2.

Picketing from June 4–8

Prior to June 9, the jobsite had one active entrance, located on Delaware Street near the southeastern corner of the site.⁶

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Picketing began at between 6–6:30 a.m. on June 4, with signs stating "No Contract No Work Laborers Local #1075." The pickets stayed until about 2:30 p.m. These were more or less the hours of picketing throughout its duration.

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MacAskill testified without controversion, and I find, that he went over to the pickets and asked Jeff Perkins, the Local's Business Agent, what the dispute concerned. Perkins replied that the union had a dispute with the AGC out of Lansing concerning funding of the retirement package: the AGC had given them a final proposal thereon in negotiations, said, "Take it, or leave it," and then left the table.

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Between approximately 6:30 –7 a.m., employees of the following contractors showed up for work: BG, Casadei Steel Inc. (Casadei), Port Huron Roofing Company (Port Huron), Contrast Mechanical Inc. (Contrast), Delta Temp, Inc. (Delta), and Gillis Electric (Gillis). BG, contracted to do masonry work, was the only company that would have used laborers that day. The employees of all of these companies except Contrast, a nonunion plumbing contractor, left within an hour or so without performing any work. Gemelli was not scheduled to work until later in the following week.

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On June 5, employees of Contrast, Delta, and Casadei crossed the picket line; employees of BG, Gillis, and Port Huron again showed up but left without working.

On June 8, Casadei, Contrast, and Delta employees performed work; Gillis employees did not. On or about this date, Bartlett, as a representative of the District Council, began participating in the picketing, having been asked to do so by District Council Business Manager Gary Jorgensen.

Establishment of Separate Gates

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On the late afternoon of June 5, MS took steps to set up a second viable entrance, about 300 feet north of gate 1 on Delaware.⁷ By letter of June 5, sent by certified mail and received by the Local on June 8, and also by fax of June 5, Banchero notified the Local that a dual-entrance system would be in effect beginning on June 9, with gate A to be for BG and Gemelli, and gate B for all other companies.⁸ Banchero similarly notified BG and Gemelli and other companies of such.⁹ MacAskill provided Gemelli a key to gate A. He did not give one to BG because its employees had not crossed the picket line, and he could open the gate for them if necessary.

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Late in the day on June 8, MS put up signs at the two gates, identifying gate 1 as "gate B," and the other as "gate A." The latter stated that it was exclusively reserved for personnel, visitors, subcontractors and suppliers of BG and Gemelli; all others must use gate B. The sign at gate B said that it was for the use of employees, visitors, subcontractors, and suppliers of all

⁶ See gate 1 (aka gate "B") on GC Exh. 3, a diagram.

⁷ Gate "A" on GC Exh. 3.

⁸ GC Exh. 11 & 14.

⁹ See GC Exh. 15.

companies except BG and Gemelli. 10 The entrances were about the same width between hinge posts.

Picketing, June 9–25

The pickets arrived at their normal time on the morning of June 9, carried the same signs, and picketed at gate B. MacAskill testified without controversion, and I find, the following. He asked Perkins to move the picketing to gate A. Perkins responded that they did not need to move because this was an informational picket line.

The pickets did not change their location. Gillis employees showed up that day and worked. BG employees continued to be scheduled on a daily basis, but they honored the picket line.

Until the last day of picketing, on June 25, the pickets usually stayed at or in the vicinity of gate B, but on several hot days, they moved out to a tree about 100–200 feet away.¹¹ They never picketed at gate A.

On about June 24, shortly after BG signed an agreement, the picket signs added "Gemelli Concrete." Gemelli employees never crossed the picket line.

Gemelli testified without controversion, and I find the following. After expiration of Gemelli's independent agreement with Respondents, she directly negotiated a new contract with Chris Chwalek, the District Council's secretary-treasurer. They had about five conversations during the period from early June to June 25. In the first, he called, identified himself, and said that she would be receiving by e-mail a new agreement to review. In about the third conversation, Chwalek stated that an NLRB agent had told him that he needed to put Gemelli's name on the sign, which he was going to do; he urged her to sign a new agreement. During negotiations, Gemelli sought advice from the AGC.

On June 25, she signed an agreement, which representatives of both the Local and the District Council also signed.¹³ Gemelli employees performed at the jobsite the following day.

Bartlett testified, and I find, that the picketing stopped because Gemelli signed a contract.¹⁴ In this regard, MacAskill testified without controversion, and I further find, that on the morning of June 26, he heard Bartlett call to him from across the street, "Thanks, Brian. Gemelli signed, and we're all set."¹⁵

There is no assertion that the pickets ever blocked the gates or otherwise engaged in interference or disruption. Conversations between MacAskill and Perkins were always amiable. No evidence was introduced that the integrity of the dual-gate system was ever breached.

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¹⁰ See GC Exhs. 4–7, photographs.

¹¹ See GC Exhs. 8–10 & 20, photographs.

¹² Tr. 147, testimony of Bartlett.

¹³ GC Exh. 16.

¹⁴ Tr. 149.

¹⁵ Tr. 87. I therefore do not credit Bartlett to the extent he testified that the picketing related to Respondents' impasse in negotiations with the AGC.

Analysis and Conclusions

The District Council and Local as Joint Respondents

The picket signs identified only the Local, and Respondents' joint answer denied that the District Council and the Local acted in concert and in a joint venture in the picketing conduct. However, the District Counsel had direct and integral involvement therein, as reflected by the fact that its business manager asked Bartlett to participate in picketing, and he did so. Further, during the period of picketing, Gemelli was engaged in contract negotiations directly with the District Council's secretary treasurer and with no one from the Local, and its June 25 agreement was with both the District Council and the Local.

In these circumstances, I conclude that the District Council was jointly liable with the Local for any violations.

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The Picketing

Briefly stated, Section 8(b)(4)(B) of the Act prohibits a labor organization that has an object of forcing or requiring any person to cease doing business with any other person to (i) induce or encourage any individual to strike or refuse to perform work or provide services during the course of his or her employment; or (ii) threaten, coerce, or restrain a person engaged in commerce or in an industry affecting commerce. "Informational picketing" intended solely to inform the public of a labor dispute is exempt from this prohibition.

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Put another way, a labor organization cannot picket with an object of interfering with the operations of employers with which it has no labor dispute (secondary employers) in order to exert pressure on employers with which it has a disagreement (primary employers).

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Picketing that has as one of its objects such a secondary objective is illegal, even if the union has other goals as well. *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 689 (1951). Respondent's intent, not the effect of the picketing, determines a violation. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951); *Carpenters (DWA Trade Show & Exposition Services)*, 339 NLRB 1027 (2003).

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Picketing may occur at a "common situs," i.e., a jobsite where work is being performed by an employer with which a union has a labor dispute (a primary employer) and by other employers (neutral employers). In such situations, the union's right to exert pressure on the former must be balanced with the need to protect neutral employers from enmeshment in a dispute not their own. *Denver Building Trades Council*, above at 691.

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In the lead case of *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), the Board set out certain standards to determine whether picketing at a common situs is primary in nature, as opposed to secondary:

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- 1. The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises.
- 2. At the time of the picketing, the primary employer is engaged in normal business at the situs.
- 3. The picketing is limited to places reasonably close to the location of the situs.
- 4. The picketing clearly discloses that the dispute is with the primary employer.

Failure to comply with one of more of these standards creates a strong but rebuttable presumption that the picketing had an unlawful secondary object. *Electrical Workers Local* 970 (Interox America), 306 NLRB 54, 58 (1992); *Electrical Workers Local* 332 (W.S.B. Electric), 269 NLRB 417, 421 (1984).

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As a means of isolating the situs of a union's labor dispute with a primary employer, a separate entrance or gate can be reserved for the separate and exclusive use of the primary employer and its employees, suppliers, and customers, with other gates reserved for the exclusive use of neutral employers and their employees, suppliers, and customers. See *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 681–682 (1961). When a valid dual-entrance system is in effect, a union's picketing at a neutral gate violates *Moore Dry Dock*, above, and gives rise to the presumption that the union's objective is secondary. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593, 500 (1999); *Operating Engineers Local 150 (Harsco Corp.)*, 313 NLRB 659, 668 (1994), enfd. 47 F.3d 218 (7th Cir. 1995).

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The General Counsel contends that Respondents' picketing demonstrated a secondary object prior to June 9 because the picket signs did not identify the employers with whom Respondents had a dispute and because the picketing occurred at times when both primary contractors were absent from the site. The General Counsel avers the same for the picketing from June 9 on, as well as that Respondents picketed at the gate reserved for neutral contactors.

First of all, it is patently clear that the labor dispute in question involved BG and Gemelli. Gemelli signed an agreement on June 25, and Bartlett admitted that picketing stopped the next day because of that. This was further evidenced by Bartlett's calling to MacAskill on the morning of June 26 that "Gemelli signed, and we're all set." Further, immediately after BG signed an agreement in late June, the Union had "Gemelli Concrete" added to its picket signs. I note that MS had no laborers on the jobsite and was not party to the AGC multiemployer contract with the Respondents that had expired.

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It is undisputed that the picket signs did not identify the primary employer(s) until shortly before the last day of picketing on June 25, when "Gemelli Concrete" was finally added. Thus, I conclude that the picketing failed to meet *Moore Dry Dock* on this basis. See *DWA Trade Show*, above at 1029.

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As far as picketing when the primary employers were absent, Gemelli was not scheduled until later in the second week of picketing. However, BG, the other primary employer, was scheduled to perform work as of the first day of picketing, June 5. Indeed, its employees showed up but refused to cross the picket line. During the entire period of picketing, BG was scheduled to perform jobsite work on a continuous basis. Accordingly, I do not conclude that picketing ran afoul of *Moore Dry Dock* on this account.

Finally, I turn to the dual-gate system that MS established on June 9. Respondents were on notice of this prior to June 9, maybe as early as June 5 but certainly by June 8. In any event, MacAskill asked Perkins to move the picketing to gate A on the morning of June 9, and Perkins refused. From June 9–25, Respondents frequently picketed at or near gate B, and never at or near gate A. I therefore conclude that the pickets' failure to confine their picketing to the situs of their labor dispute with BG and Gemelli on or after June 9 was a further reflection of an unlawful secondary objective under *Moore Dry Dock*. See *Oil Workers Local 1-591* (*Burlington Northern Railway*), 325 NLRB 324, 328 (1998).

Accordingly, I conclude that the evidence raises a strong but rebuttable presumption that the picketing had a secondary objective. I further conclude that that the Union has failed to rebut this presumption and, consequently, that the picketing was unlawful under Section 8(b)(4)(B) (i) and (ii). See *Burlington Northern Railway*, ibid.

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Conclusions of Law

- 1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.
- 2. The Charging Party and the other contractors and subcontractors performing work at the jobsite are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) and 8(b)(4) of the Act.
- 3. By the following conduct, Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(b)(4)(i) and (ii)(B) of the Act:
- (a) Induced or encouraged individuals employed by neutral employers to engage in a strike or a refusal to perform work in the course of employment, with an object of forcing or requiring the Charging Party to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, LLC, the primary employers.
- (b) With such an object, threatened, coerced, or restrained the Charging Party and other neutral employers.

Remedy

Because I have found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended 16

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ORDER

The Respondents, Local 1075, Laborers' International Union of North America, Mount Morris, Michigan, and Michigan Laborers' District Council, Lansing, Michigan, their officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Inducing or encouraging any individual employed by Casadei Steel Inc., Delta Temp, Inc., Gillis Electric, and Port Huron Roofing Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal to perform work in the course of employment, where an object is to force McCarthy & Smith, Inc., or any other person to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, LLC.

¹⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Threatening, coercing, or restraining McCarthy & Smith, Inc., Casadei Steel Inc., Delta Temp, Inc., Gillis Electric, and Port Huron Roofing Company, or any other person engaged in commerce or in an industry affecting commerce, by picketing, where an object is to force McCarthy & Smith Inc. or any other person to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, LLC.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at their Lansing, Michigan office and Mount Morris, Michigan union hall, in locations where notices are customarily posted, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondents' authorized representative, shall be posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed the facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current members and former members of Respondents at any time since June 4, 2009.
- (b) Provide copies of the notice for posting by the Charging Party or any of the other employers named in the Complaint.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. October 29, 2009.

IRA SANDRON
Administrative Law Judge

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

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Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has 10 ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union 15 Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT induce or encourage any individual employed by Casadei Steel Inc., Delta 20 Temp, Inc., Gillis Electric, and Port Huron Roofing Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal to perform work in the course of employment, where an object is to force McCarthy & Smith or any other person to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, LLC.

WE WILL NOT threaten, coerce, or restrain McCarthy & Smith, Inc., Casadei Steel Inc., Delta Temp, Inc., Gillis Electric, and Port Huron Roofing Company, or any other person engaged in commerce or in an industry affecting commerce, by picketing, where an object is to force McCarthy & Smith, Inc. or any other person to cease doing business with Brazen & Greer, Inc. and Gemelli Concrete, LLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

35 LOCAL 1075, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA And MICHIGAN LABORERS' DISTRICT COUNCIL 40 (Employer) (Representative) Βv (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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477 Michigan Avenue, Federal Building, Room 300 Detroit, Michigan 48226-2569 Hours: 8:15 a.m. to 4:45 p.m. 313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S